STATE OF MICHIGAN
SUPREME COURT

PHOENIX INVESTMENT HOLDING COMPANY, INC., a Michigan corporation, WOODLAND EXCAVATING, L.L.C., a Michigan limited liability company, and WILLACKER HOMES, INC., a Michigan corporation,

Plaintiffs/Appellants,

-vs-

NOSAN & SILVERMAN HOMES, L.L.C., SILVERMAN DEVELOPMENT CO., SILVERMAN HOMES, INC., SILVERMAN CONSTRUCTION CO. and TOLL BROTHERS, INC.,

Defendants/Appellees.

Case No. _____ ap 4/20/0
COA Docket No. 246398
Oakland County Circuit Court
Case No. 01-035158-CK
Hon. Rudy J. Nichols

_____/

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**DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL ARIL 20, 2004 OPINION**
**PROOF OF SERVICE**





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## ORDER APPEALED FROM AND RELIEF SOUGHT

Defendants apply for leave to appeal, or for summary reversal of, two portions of the Court of Appeals' April 20, 2004 opinion attached as Exhibit A (Defendants' motion for reconsideration was denied on June 7, 2004). As to both issues, it is fair to say that the Court of Appeals' analysis was sloppy and fundamentally unfair, not to mention clearly erroneous and the cause of material injustice – this is not just a question of a losing party being unhappy with the result, it is a question of the capacity of the judicial system to interpret sophisticated real estate agreements. Sophisticated parties, who draft and enter into such sophisticated agreements, are entitled to fair treatment from the Michigan courts. Specifically, they are entitled to have agreements interpreted in such a way as to permit predictability.

## QUESTIONS PRESENTED

Here are the two issues:

1. The Court of Appeals ordered that Defendant Toll Brothers, Inc. was potentially liable to Plaintiffs based on a guaranty of a certain obligation of Defendant Silverman Development Company, Inc., pursuant to paragraph 3(F) of the August 4, 1999 Second Amendment to Options Agreement. Exhibit B. However, the underlying obligation of Defendant Silverman Development Company was subject to the liquidated damages provision in the 1997 Options Agreement, Exhibit C (highlighted in yellow), as the Court recognized. Therefore, the Toll Brothers guaranty was also subject to this same liquidated damages provision. The Court of Appeals simply failed to analyze this issue (there is no discussion at all of the relevant law), and if commercial parties believe that the courts are

capable of such a basic failure, how can they reasonably rely on the language in the contracts they agree to?

2. The Court ordered that the liquidated damages provision in the 1997 Options Agreement did not control Plaintiffs' claim for failing to enter into the excavation contract. However, the Court misquoted the relevant portion of the liquidated damages provision, completely leaving out the portion that concerns "non-monetary defaults." Exhibit C (highlighted in green). Since an alleged failure to enter into the excavation contract is a "non-monetary default", Plaintiffs' remedies would be limited to those contained in the liquidated damages provision in the 1997 Options Agreement. Again, how can commercial parties, or any parties, rely on language in contracts when the courts are able to ignore whole paragraphs?

There is a critical unintended byproduct of the Court of Appeals' mistakes: counsel around the state will encourage parties to litigate what would otherwise be clear contract language. If there is the slightest possibility that the Court of Appeals would do what it did in this case, a party has every incentive to take a chance with protracted litigation, making every possible argument. Indeed, it could become *necessary* to litigate cases this way so that "no stone is left unturned." Surely that cannot be the message that this Court intends to convey to the bar.

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## MATERIAL PROCEEDINGS AND FACTS[1]

This is a case between parties to a series of real estate transactions. Plaintiff Phoenix Investment Holding Company, Inc. ("Phoenix") claims that Defendants Nosan & Silverman Homes, L.L.C. ("Silverman") and Silverman Development Co. ("Silverman Development") breached their obligations related to the development of a condominium project in Lyon Township. Phoenix, although not owner of the fee title, had an interest in the real estate. Phoenix, in turn, granted Silverman and Silverman Development certain options.

Two written agreements control this case: (1) an October 15, 1997 Options Agreement; and (2) an August 4, 1999 Second Amendment to Options Agreement.[2]

In Count One of the Complaint, Phoenix claims that Silverman and Silverman Development breached the Options Agreement and Second Amendment to Options Agreement by not exercising their options to acquire five sites in Phase II of the development from the fee title owner, DeMaria Investments (not a party to this action). According to Phoenix, if Defendants had exercised their options and acquired the sites, Phoenix would have received $84,619.25.[3]

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[1]All of the relevant facts are contained in the complaint and agreements between the parties that were attached to the pleadings in the lower court

[2]There was a June 2, 1998 First Amendment to Options Agreement, but it simply re-defined Phase II of the development and is irrelevant here.

[3]Paragraph 3 of the Options Agreement sets forth Silverman's obligations to exercise options. In the Second Amendment to Options Agreement, Silverman's rights were assigned to Silverman Development, and in Paragraph 3(E) of the Second Amendment, Silverman Development agreed to exercise its options and acquire all of the remaining Phase II Units in accordance with the terms and conditions in the Options Agreement. The fees to be paid to Phoenix are set forth in Paragraph 2 of the Options Agreement.

In Count Two, Phoenix claims that Silverman and Silverman Development breached the Options Agreement and Second Amendment to Options Agreement by not hiring Phoenix to perform excavation and other work at the sites.[4]

In Count Four, Phoenix claims that Defendant Toll Brothers, Inc. guarantied the obligations complained of in Count One.[5]

## ARGUMENT

### 1. THE COURT OF APPEALS ERRONEOUSLY REMANDED THE ACTION TO DETERMINE THE LIABILITY OF TOLL BROTHERS

At page 3 of the Opinion, the Court of Appeals discussed Toll Brothers' guaranty, found in paragraph 3(F) of the August 4, 1999 Second Amendment to Options Agreement. Exhibit B. According to the Court, a question of material fact remained regarding Toll Brothers' possible liability as a guarantor that might exceed the liability of the principal debtor, Silverman Development Company. Exhibit A, at 3 (highlighted in yellow). Silverman Development Company had no further liability to Plaintiffs due to the liquidated damages provision. There are two fundamental flaws in this holding that the Court can and should correct immediately.

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[4]Paragraph 5 of the Options Agreement provides that Silverman will enter into an excavation contract with Phoenix, "subject to mutual agreement" on pricing. Paragraph 5 of the Second Amendment to Options Agreement provides for the same relationship between Silverman Development and Phoenix.

[5]Paragraph 3(F) of the Second Amendment to Options Agreement provides that Toll Brothers, Inc. guarantied "the obligations of Silverman Development" regarding acquisition of "the remaining Phase II Units..."



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First, the issue of whether Toll Brothers, the guarantor, might have an obligation above and beyond that of the principal debtor, Silverman Development Company, was not raised by Plaintiffs. To the contrary, Plaintiffs simply argued that the guaranty was *evidence of* the Plaintiffs' proposed interpretation of the 1997 Options Agreement (Plaintiffs argued that the guaranty could only be read as support for their position that Plaintiffs had remedies beyond the liquidated damages contained in the 1997 Options Agreement). This proposed interpretation was, of course, rejected by the Court of Appeals. Therefore, by ruling that there are questions of fact regarding the scope of the guaranty, the Court of Appeals has improperly ruled on an issue not raised by Plaintiffs, and certainly not briefed by any of the parties. *See Walters v Quality Biscuit Division of United Biscuit Co of America*, 336 Mich 214, 222 (1953)(party is precluded from raising an issue on appeal that was not raised in the pleadings or brought to the attention of the lower court). An appellate court is obligated to review only issues which are properly raised and preserved. *People v Grant*, 445 Mich 535, 546 (1994); *Camden v Kaufman*, 240 Mich App 389, 400 n. 2 (2000).

Second, the Court of Appeals' holding is not supported by Michigan law, a point that certainly would have been raised by Toll Brothers if this issue had been presented for briefing and/or argument. The starting point for the analysis is a review of the guaranty itself: Toll Brothers' guaranty was specifically limited in scope. In paragraph 3(F), Toll Brothers guarantied "the obligations of Silverman [Development Company] with regard to the acquisition of the remaining Phase II Units, in accordance with the terms and conditions of the Options Agreements, as amended." The first question is therefore: what were the "obligations of Silverman [Development Company]"? As the Court found, Silverman Development Company, while possibly required to acquire certain units in Phase II, could not be sued

for failing to acquire these units because of the effect of the liquidated damages provision in paragraph 11 of the 1997 Options Agreement. Exhibit C. In short, Plaintiffs had already received their remedies against the principal debtor, Silverman Development Company; Silverman Development Company had no remaining "obligations" to Plaintiffs.

Because there were no remaining "obligations" of Silverman Development Company, the guaranty could not subject Toll Brothers to any *additional* liability. The law of guaranties unequivocally supports Toll Brothers. This Court has noted that "a guaranty contract – like a surety contract – is a special kind of contract," and has observed:

> The undertaking of a surety is to receive a strict interpretation. The surety has a right to stand on the very terms of the contract. To the extent and in the manner and under the circumstances pointed out in his obligation, the surety is bound, and no further. The liability of a surety is not to be extended by implication beyond the terms of his contract. A surety cannot be held beyond the precise terms of his agreement. As said by Chancellor Kent, "The claim against a surety is *strictissimi juris*."

*Bandit Industries, Inc. v Hobbs Int'l, Inc.*, 463 Mich 504, 511-512 (2001), quoting *Ann Arbor v Massachusetts Bonding and Ins Co,* 282 Mich 378, 380; 276 NW 486 (1937) (internal citations omitted).]; *See also Wallace Hardware, Inc. v Abrams*, 223 F3d 382, 401 (6th Cir 2000)("We begin our analysis of this issue by noting some basic principles of the law of guaranties. As guarantors, the Abrams brothers are liable to Wallace Hardware only to the extent that the principal debtor, Tri-County, was liable to Wallace."); *Bank of Three Oaks v Lakefront Properties*, 178 Mich App 551, 558 (1989)("Logically, however, the guarantors cannot be liable for a liability which [the principal debtor] never incurred."). Again, the Court of Appeals did not have the benefit of this analysis because the issue ***was not raised or briefed.***



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Under the law of guaranties, Toll Brothers cannot have an obligation to Plaintiffs greater than the obligation of the principal debtor, Silverman Development Company.

The parties to this case, and contracting parties throughout the state, are ill-served by such an incomplete analysis of critical contractual provisions; guarantors in particular now risk a judicial determination that guaranties strictly limited on their face *might* be interpreted more broadly. Counsel representing a creditor may now be mandated to sue a guarantor even in the face of such a limited guaranty.

## 2. THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT THE LIQUIDATED REMEDIES PROVISION DID NOT GOVERN A CLAIM FOR FAILURE TO ENTER INTO THE EXCAVATION CONTRACT

The Court of Appeals' second error can be attributed to an inexplicable omission in the Court's opinion: when the Court quoted the language of the liquidated damages provision, the Court ***left out the second half of the provision*** regarding "non-monetary defaults." Exhibit C (highlighted in green). For some reason, the Court instead quoted only the first half of the provision. Exhibit A, at 2 (highlighted in green). As a result, in its discussion of the excavation contracts, the Court erroneously concluded that the default provision "did not apply to a 'non-monetary failure'..." Exhibit A, at 5 (highlighted in yellow). Plaintiff did not even advance this argument, nor could it have given the clear language of the agreement.



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The clear language of the default provision covers a "non-monetary" default such as the alleged failure to enter into excavation contracts, as well as a failure to exercise options or acquire lots. Plaintiffs' claims related to the excavation contracts should therefore have been dismissed. It is simply inconceivable that contracting parties would have to govern themselves knowing that there is a possibility that if a dispute arises, and the case proceeds to the Michigan Court of Appeals, that court might ***leave out*** part of the contract.[6]

## RELIEF REQUESTED

The lower court's decision should be affirmed.

Respectfully submitted,

JACKIER, GOULD BEAN, UPFAL & EIZELMAN

By: _____
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Attorneys for Defendants

DATED: July 16, 2004

[6]Once the Court concludes that the liquidated damages provision governs the excavation contract, the Court does not need to determine the effect of the merger and integration clause. Although the June 1, 1998 pricing structure may prevent Defendants from arguing that there was only an "agreement to agree" concerning excavation of Phase II, there is nothing in the June 1, 1998 pricing structure that would override the liquidated damages provision in the 1997 Options Agreement. Simply put, the alleged failure to enter into an excavation contract was a "non-monetary" default under the terms of the 1997 Options Agreement, for which the remedy was contained in the liquidated damages provision.



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The undersigned certifies that a copy of the foregoing document was served upon the attorneys of record of all the parties in the above cause by serving same to them at their respective business addresses as disclosed by the pleading of record herein on the 16th day of July, 2004, via U.S. Mail.

Threresa Sienko

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